BAR BRIEFS

Official Publication of the Macomb Bar Association

July 2023

95th Macomb Bar Association President
Ryan Zemke

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Bar Briefs

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Macomb Bar Association
Macomb County Circuit Court Building
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MACOMB BAR ASSOCIATION
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Put Me In, Coach!

By Sherriee L. Detzler, National Director at Helix Bar Review

I'm ready to play!

When I heard that another text had come in, my initial thought was, "What now?" But to my delight, the ask this time was, "Would you like to introduce Ryan Zemke as President of the Macomb County Bar Association?" Oh YES! You BETCHA!

I could give so much information about Ryan that you would feel like you birthed him! Luckily though, I will limit myself to talking about why I know Ryan is going to lead our organization in a way that has never been done before and how his leadership will benefit of each of us, our organization, and our profession.

Gratefully, I've known Ryan since he began his legal career. When he came out of law school in 2008, our profession was essentially on hold and job opportunities were slim. Ryan hung out his shingle at my office and began practicing indigent criminal defense with a splash of not-so-fun cases to pay the bills. In order to support his family and get through this trying time, however, Ryan also delivered pizzas and sold Halloween costumes. While a practicing lawyer, Ryan distinguished himself through his dedication to his clients, his legal acumen, and his integrity. Now Ryan serves as a magistrate for the 41B District Court.

Initially blessed with a "baby" attorney to mentor, I now have a colleague, confidant, and true friend. I saw (and experienced) in Ryan a constant "spark." Ryan was always someone with a vision. And that vision, folks, is what he will bring to the MCBA. Ryan will knock whatever fastballs are thrown his way out of the park to achieve our collective home runs!

Over the last 15 years, everyone who served on a Board with Ryan or had a child on his child's team would know just how committed and involved Ryan is with his family, community, and our entire legal profession. There is no "I" in TEAM for Ryan! Collectively, he has volunteered his time and talents to serve in various roles in over 20 different organizations, teams, and committees where he has learned, honed, and grown his skills to become a well-respected and talented Leader. I encourage you to check out Ryan's Professional Bio. On a personal level, while he may not be the sole leader of his family, he is on the leadership team of a very happy, healthy, and all-star crew!

Ryan became active in the Macomb County Bar as soon as he was sworn in. First serving through the MCBA Young Lawyers (2009-2017) and now serving the membership through his various roles on the MCBA Board of Directors since 2017. At each phase of his bar leadership, he has focused on creating a vision for the future and inspiring others to make it reality. Ryan has always been driven and inspired by what the Macomb County Bar Association can become! A grand slam is on the horizon!

As a visionary leader and its president, Ryan will bring to this organization strong communication skills, actions to mentor others, the ability to look at the big picture, and motivation to inspire you to be part of the team to work together. He is an incredibly creative problem solver who can think outside the box and find innovative solutions to even the most difficult challenges. He is strategic and willing to take risks to move the MCBA past the status quo and strive to push boundaries to achieve the best for the MCBA and its members.

Ryan leads by example and best practices – he knows what it takes to get in the game. As your president, you can (and should) expect from Ryan:

- A well-thought-out vision to move the MCBA forward
- Motivation and inspiration to "join the team" to work together to carry out the details
- New Ideas and innovations to reach our collective vision
- Collaboration and cooperation to improve the services and benefits of being a MCBA member
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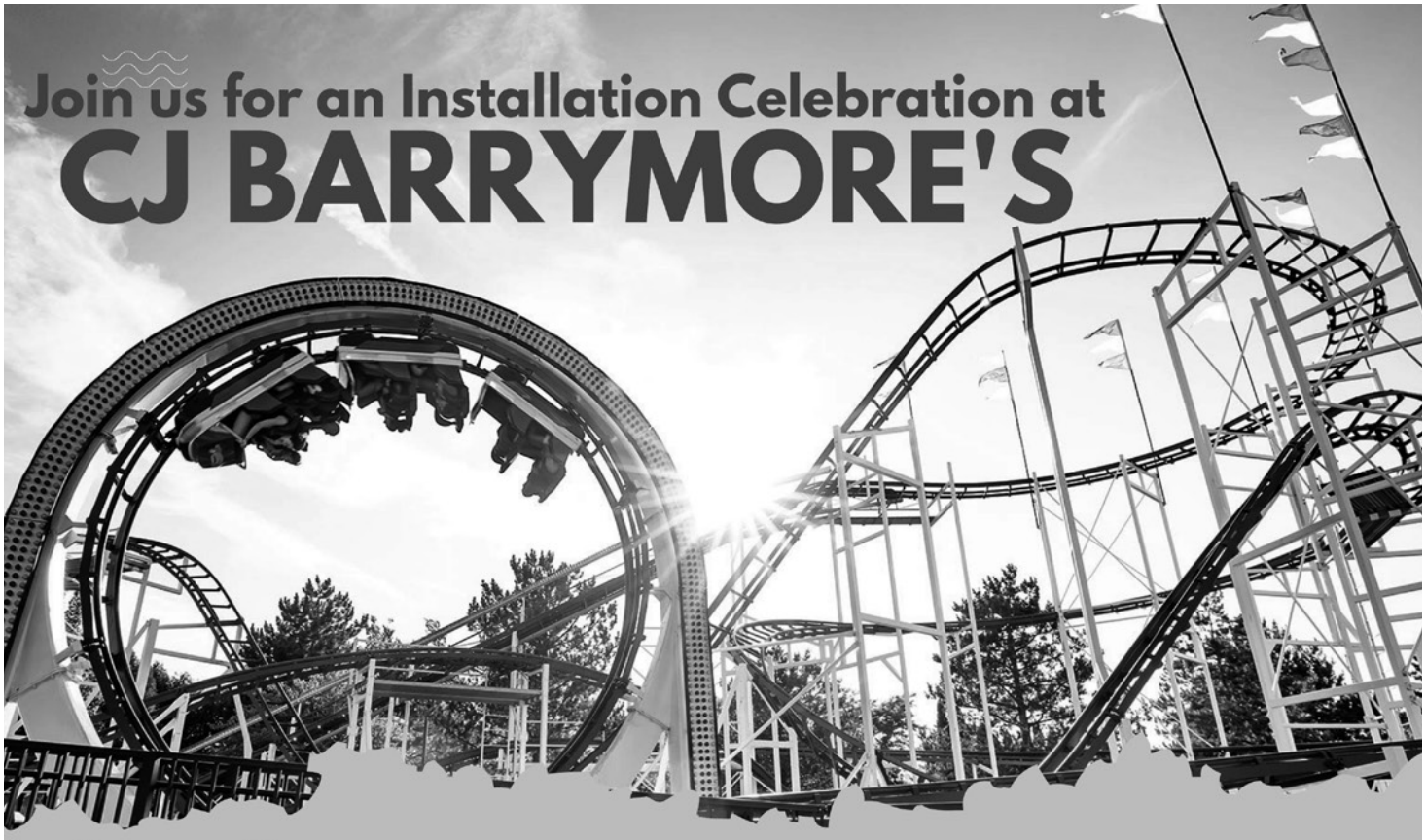
Ryan will not let you down – but again there is no "I" in TEAM, so I encourage you to reach out to Ryan. He has a WIDE-OPEN DOOR to listen, learn, and envision!

Today!



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Legal Insights from Warner Norcross + Judd

Identifying the Source of Goods & Services Is No Laughing Matter

By Brian D. Wassom, Partner

On June 8, 2023, the United States Supreme Court clarified an important unanswered question about the line between the First Amendment's freedom of speech and trademark owners' rights under the Lanham Act. In a unanimous, 9-0 decision in the closely watched case *Jack Daniel's Properties, Inc. v. VIP Products, LLC,* the Court revived a lawsuit for trademark infringement and dilution filed by the owner of the world-famous Jack Daniels brand of whiskey. The outcome of the case establishes a new legal principle: when a company uses a trademark as a trademark—in other words, for the purpose of identifying the source of goods and services—neither the First Amendment nor the defense of "parody" shield that use from liability for infringing or diluting another party's trademark.

A parody to the famous Jack Daniel's Old No. 7 Tennessee Sour Mash Whiskey bottle stands at the center of this dispute. This design is so famous that the Justice Kagan, who writing the majority opinion, advised the reader to "retrieve a bottle from wherever you keep liquor; it's probably there." The bottle bears the distinctive registered trademarks JACK DANIEL'S and OLD NO. 7. The arched Jack Daniel's logo, stylized label and shape of the bottle itself are also all registered trademarks.

The defendant in the case, VIP Products, is a dog toy company that sells "Silly Squeakers" toys designed to imitate and make fun of other famous brands. The BAD SPANIELS dog toy is one of them. This product mimics the Jack Daniel's bottle, including its bottle shape, stylized label, and word marks. But it adds the image of a dog and replaces the original Jack Daniel's text with dog-themed humor. Instead of "Old No. 7 Tennessee Sour Mash Whiskey," the label reads "The Old No. 2 On Your Tennessee Carpet." And the small print at the bottom substitutes "43% poo by vol." and "100% smelly" for "40% alc. by vol. (80 proof)."

Jack Daniel's sued VIP for (1) trademark infringement, a claim alleging use of BAD SPANIELS is likely to confuse customers about whether the product comes from the plaintiff, and (2) and trademark dilution, a statutory claim available to famous brands that prohibits others from using marks that would decrease the unique, source-identifying function of the plaintiff's mark regardless of a customer's likelihood confusion.

The district court denied VIP's summary judgment motions, and Jack Daniel's won at a bench trial, where the judge reached the unremarkable conclusion that associating plaintiff's famous mark with "canine excrement" would cause Jack Daniel's "reputational harm."

On appeal, however, the United States Court of Appeals for the Ninth Circuit reversed based on *Rogers v. Grimaldi,* 875 F. 2d 994, 999 (CA2 1989), a decision that found trademark law inapplicable to "expressive works." Although it had never before been evaluated by the Supreme Court, courts routinely used the "*Rogers* test" to dismiss trademark clams about use of a mark in an expressive work unless the complainant can show one of two things: that the challenged use of a mark "has no artistic relevance to the underlying work" or that it "explicitly misleads as to the source or the content of the work."

The *Rogers* case itself rejected a claim brought by Ginger Rogers and Fred Astaire over a movie entitled "Ginger and Fred." The characters in that movie imitated the two famous dancers, and the court held that the title was an artistic commentary rather than a misleading identification of goods or services. Applying *Rogers* to the BAD SPANIELS case, the Ninth Circuit held that Bad Spaniels was an "expressive" and "noncommercial" work—even though it was used on a retail product —because it "parodies" and "comments humorously" on Jack Daniel's.

The Supreme Court unanimously reversed the Ninth's Circuit's decision. In so holding, it did not comment on the validity of the *Rogers* test in general, although both parties had urged it to do so. Rather, the Court limited itself to the situation at hand—that is, even assuming that *Rogers* is an accurate statement of the law in other circumstances, does it shield an alleged infringer from liability for selling products under a name that parodies another brand? The answer was a resounding "no."

The Court reached this conclusion by sticking to the crux of trademark protection and the purpose of trademark law. A trademark is any symbol, word, or other device used in commerce to identify the source of goods or services. Trademark law is designed to prevent customers from being confused about from where goods or services are coming. In short, trademark law protects customers from being duped by imitation goods and safeguards their ability to make informed choices. When a party's trademark is close enough to another party's mark that customers are no longer certain which of the parties is selling the good or service, trademark infringement exists.

(cont.)

But trademark rights are limited to this commercial context. They do not grant trademark owners ownership of the word or symbol in all circumstances. That would go too far in limiting the free speech guaranteed by the First Amendment, which is what the *Rogers* test was designed to protect. Plenty of cases have applied *Rogers* to reject trademark claims under circumstances in which a word or symbol that functions as a trademark is used in some other, non-trademark way, such as the name of a book or movie, or as a song lyric, film dialogue, or other expressive work.

Here, however, VIP used "Bad Spaniels" as a trademark—that is, to indicate the source of its goods. Thus, the Court ruled, the mere fact that the mark also seeks to comment on another mark doesn't exempt VIP from the same likelihood of confusion test that all courts apply to determine whether one mark infringes another.

Justice Kagan did not dismiss the intended humor of the mark entirely; rather, she said "that kind of message matters in assessing confusion because consumers are not so likely to think that the maker of a mocked product is itself doing the mocking." But that argument is more properly considered as one factor of the Lanham Act's likelihood of confusion analysis, rather than as a free pass from liability.

This decision has trademark owners across the country breathing a deep sigh of relief. The internet already makes it easy to peddle knockoffs and debatably humorous imitations of famous products. Had this case come out differently, infringers would have been even more emboldened to use trademarks and trade dress nearly identical to all sorts of famous brands, and those brands would have been significantly handicapped in their ability to defend their goodwill. This decision strikes a healthy balance between safeguarding the ability of trademarks to perform their source-identifying function, while still leaving breathing room for legitimately non-confusing social commentary.

Indeed, if anything, the decision signals that the Court may one day go even farther in limiting the application of the First Amendment to trademarks. Three of the Court's most conservative Justices filed a concurring opinion signaling their skepticism that *Rogers* was rightly decided in the first place. That brief opinion expressly invites the lower courts to consider this view, meaning that we will certainly begin to see more challenges to the *Rogers* framework, and perhaps court rulings that further limit or discard it entirely. If that happens, what the new balance between trademark law and the First Amendment remains an open question.

Fortunately, the Intellectual Property and IP Litigation teams here at Warner remain on top of these developments. Every day, we are applying the latest law and legal strategies to best protect our client's valuable goodwill and intangible assets, even in situations where the law is less than clear. If you have questions about trademark law and expressive works, reach out to one our team members today.

Advocating in a wide range of commercial and intellectual property matters, ***Brian Wassom*** *litigates disputes and counsels clients in matters of commercial branding, publicity rights, creative expression and privacy. His practice serves businesses in many industries and spans the legal doctrines of copyright, trademark, privacy, right of publicity, advertising, journalism and related fields. Brian has devoted his career to understanding new technologies and media and their relationship to the ever-evolving legal landscape and helping clients best traverse uncharted territory.*

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2023 Annual

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Passwords May be Extinct Sooner Than You Think

By Sharon D. Nelson, Esq., John W. Simek, and Michael C. Maschke

Lawyers Hate Passwords

Lawyers have hated passwords since passwords first made their appearance. They resisted having them until their employer (or cyberinsurance company) compelled them. Then they constructed simple, too short passwords – 123456 and the like – easy to guess or crack. They used the names of their pets, their children, their favorite sports teams, etc. They set themselves up for failure at every point.

They left post-it notes on their monitors, under keyboards and in their desk drawers. They reused their passwords all over the internet. They shared their passwords with colleagues at their law firms. Even those who agreed, after much gnashing of teeth, to use a password manager, hated them – and they still reused and shared passwords.

The misery of data breaches is also a compelling argument to get rid of passwords. According to Verizon's 2022 Data Breach Investigations Report, 61% of all breaches were traced to compromised credentials. Combine that statistic with IBM's estimate that the average cost of a successful phishing attack was about $4.9 million in 2022 and bad news for your firm is just over the horizon.

Along Came AI to Make Cracking Passwords Easier

At this point, AI can crack the majority of passwords in under a minute. Seven letter passwords can be cracked in under six minutes despite having numbers, upper and lowercase letters, and symbols. If you are still using passwords in your law firm, you should have passwords with at least 15 characters and make mandatory the use of lower and upper-case letters, numbers and symbols.

Security fatigue is real – and, in the era of mandated two-factor authentication, worsening. But wait – there is a growing movement to ditch passwords forever.

Going Passwordless

We aren't going passwordless overnight, but it is on the horizon and lawyers should be embracing it. Quite a stir occurred in May 2023 when Google began allowing you to log into Google websites using passkeys.

It has been a long time coming, but Apple, Microsoft, Google and others have been working toward going passwordless using passkeys instead of passwords. Passkeys typically use biometrics – fingerprints or facial recognition being the most common.

There was already passkey support by Google for its Android phone and Chrome browser, but Google websites have been added. Not convinced? No problem. In a very smart move, Google made its passkeys work but retained your ability to use other login methods so you can take a test drive and reassure yourself that this new technology is great – which it is.

Ultimately, you will see passwords disappear as more systems support passkeys. Not all at once, but when enough folks have seen how easy it is to use passkeys, and understand the monumental increase in security, the days of passwords will be numbered.

Law Firms are Warming to Passwordless

Law firms have begun to feel comfortable with the cryptographic standards that underlie passkeys. Law firms are bedeviled by data breaches, notably those pesky phishing emails/texts that try to get you to share your credentials or other confidential information.

Firms are especially delighted that some password managers (like Dashlane) can store passkeys – Dashlane even allows you to log in with a passkey instead of a password – Huzzah! Other password managers are following suit.

Another boon is that passkeys are pretty easy to understand. Your phone or your laptop creates a private and unique cryptographic key which is tied to the device. In the case of Google, your account will issue a "digital challenge" that the passkey can sign, unlocking access. Then you only need a fingerprint scan or screen-lock PIN to make sure it is you that's logging in. A point to note is that the passkey stays on the device and is not transmitted as part of the authentication process. In other words, it is not sent to Google.

Let's try another way of thinking about passkeys. You sign into your device just as you always did, using a PIN or biometrics (facial or fingerprint recognition). You set your accounts to trust your computer or phone. This is what makes it so safe. A cybercriminal would have to physically possess your device AND have a way to sign into it.

What if you lose your phone? Good question. Your passkey can be stored securely in the cloud with your phone's other data, which (no doubt you've guessed it) can be restored to a new phone.

Bad guys are outwitted and the good guys have a simpler means of secure access. Now that's a win-win for the lawyer and law firm.

Final Words:

There's a reason why you can go to Amazon and buy a tee shirt that says "I f***ing hate passwords."

Sharon D. Nelson *is a practicing attorney and the president of Sensei Enterprises, Inc. She is a past president of the Virginia State Bar, the Fairfax Bar Association and the Fairfax Law Foundation. She is a co-author of 18 books published by the ABA. snelson@senseient.com*

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Macomb County Prosecutor's Office Gun Crime Policy Overview

From the Macomb County Prosecutor's Office

The Macomb County Prosecuting Attorney has implemented a gun crime policy with the primary goal of reducing gun related crimes in the community. This policy aims to hold defendants accountable for illegally possessing guns, and addresses the important issue of mental health.

Police have expressed that the prevalence of guns is making every encounter they make more dangerous; and that a stricter stance will increase the chances to protect law-enforcement personnel and the community, and attempt to reduce gun crime recidivism.

Assistant prosecuting attorneys have some limited discretion to reduce charges in some cases, consistent with the criteria established in Macomb County Prosecutor's Office Policies. However, this discretion is limited regarding any gun-related charges. If a defendant requests a plea or deviation from any gun charge (i.e., felony firearm, CCW, armed robbery, carjacking with a firearm, assault with a firearm, or the defendant possess a firearm during the commission of a crime) it shall only be considered as follows:

1. The defense attorney (or defendant) must submit a "Deviation Request" on the Macomb County Prosecutor's website, and follow the instructions found there.

2. Along with the deviation request, the defense attorney (or defendant) must submit a current screening and assessment by a qualified mental health professional of his or her choosing, which could include any county agency that may provide such assessments, which includes language substantially similar to the following: Whether or not, there are indicators of mental illness, and if so: as a result of mental illness, whether the defendant can reasonably be expected within the near future to intentionally or unintentionally, seriously, physically, injure himself, herself, or another individual, and has engaged in an act or acts, or made significant threats that are substantially supportive of the expectation.

3. The deviation will not be considered, unless approved by the assistant prosecuting attorney in charge of the case, the police officer in charge of the case, and the victim. The deviation request must then be approved by the Prosecutor's Office unit chief, and in some cases the Chief of Trials and Courts and department head.

4. If approved, the defendant must plead to a lesser gun charge.

Furthermore, the Macomb County Prosecutor's office will ask the court to order a mental health screening and assessment as a condition of bond in all gun cases.

Lawyers Breathe a Sigh of Relief: They Can Turn Off Chat History for ChatGPT

By Sharon D. Nelson, Esq., John W. Simek, and Michael C. Maschke

A Major Ethical Barrier to Using ChatGPT is Gone

Since ChatGPT is the most adopted of the generative AIs for lawyer usage, it was distressing that it presented cybersecurity and ethical concerns. Protecting the confidentiality of client data is an ethical mandate that made many lawyers and firms shy away from using ChatGPT.

Happily, you can now turn off Chat History for ChatGPT. OpenAI, the creator of ChatGPT, announced on April 25 that it had added the option to turn off chat history for ChatGPT, which will also prevent OpenAI from using your queries to improve the program.

In a blog post, OpenAI said, "Conversations that are started when chat history is disabled won't be used to train and improve our models, and won't appear in the history sidebar."

The post also notes, "When chat history is disabled, we will retain new conversations for 30 days and review them only when needed to monitor for abuse, before permanently deleting." A lot of lawyers have asked if this bothers us – and the answer is not too much, although we acknowledge that it did suffer an outage and data leak on March 20, 2023. The problem was quickly corrected. Overall, OpenAI is a reputable company with excellent security – and it's not all that hard to secure the data held for 30 days or to auto-delete it when the 30 days expires.

So – How Do You Turn off Chat History for ChatGPT

It is quite simple. To disable chat history, click on the three dots next to your email address in the lower left corner at the bottom of the screen. Select Settings and then Show under Data Controls. Toggle the Chat History & Training slider. From the same settings screen, you also have the choice to export your data.

If you want to save chat history in some cases, you can just toggle the Chat History & Training slider. Just remember to TURN IT OFF again if you are entering confidential data.

As we are fond of saying, the point of failure is usually the human at the keyboard.

Why is this Security Enhancement so Important to the Legal Profession?

OpenAI is now working on a new ChatGPT Business subscription for professionals who require more control over their data as well as enterprises seeking to manage their end users. Its announcement said, "ChatGPT Business will follow our API's data usage policies, which means that end users' data won't be used to train our models by default. We plan to make ChatGPT Business available in the coming months."

It really is nice to see the progress OpenAI is making on the privacy front. How much will the subscription cost? Apparently, the company hasn't decided yet as there was no mention of the price. Needless to say, the higher the price, the less sweet the enhancements may feel!

The Escalation of Interest in Using AI in the Legal Profession

We noted with great interest the Thomson Reuters March 23 survey of lawyers. The statistics are rapidly changing. When asked whether ChatGPT/generative AI could be applied to legal work, an extraordinary 82% said yes.

Change the question slightly to "Should ChatGPT/generative AI be applied to legal work?" and 51% now say "yes." That's a big jump from the early days – and it is reflected in the concerns over privacy addressed above.

While the survey found that only 3% of respondents were using generative AI now, we are a little skeptical about that number simply based on all the colleagues we've spoken to who are using ChatGPT.

However, 34% of firms said they were considering using it. There is still a grinch coalition - six firms have banned it outright. While 15% have warned employees about using it, that might make sense if they were only counseling employees to use it carefully.

Approximately 80% of partners/managing partners were concerned about accuracy and security – which is perfectly reasonable – and one reason why we wrote this article, to allay some of the previous concerns, particularly about security. From an ethical standpoint, ChatGPT is certainly moving in the right direction.

Final words

"In my view, we have arrived at a major turning point, both for legal services and society. For lawyers, I think this technology will prove to be at least as transformative as the internet and quite possibly more so." – Suffolk University Law School Dean Andrew Perlman

Sharon D. Nelson *is a practicing attorney and the president of Sensei Enterprises, Inc. She is a past president of the Virginia State Bar, the Fairfax Bar Association and the Fairfax Law Foundation. She is a co-author of 18 books published by the ABA. snelson@senseient.com*

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Paid for by the CTE Peter J. Lucido for Prosecutor,
6303 26 Mile Road, Suite 203, Washington Township, MI 48094

NAME _____

ADDRESS _____

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OCCUPATION & EMPLOYER'S NAME _____

EMPLOYER'S ADDRESS _____